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BOYD TRIAL CONSULTING

Keeping Your Case Above Water

"ACCIDENTS" DON'T HAPPEN

There is a word you need to purge from your vocabulary. You should delete it from your firm's written materials, from your pleadings, and from your blogs[1]; it should be banished from your very thought process. That word is "accident."

Words matter. An easy way to lose a case is to play the defendant's game instead of your game. It took a long time, but plaintiffs' lawyers finally came to understand that to call the Civil Rule 35 event an independent medical exam was to give the process much more credibility than it deserved. We figured out that "IME" is not just a name for an event, it was a judgment about the event, that it was "independent." So now we call it what it is, a defense medical exam.

The "A" word, too, has a double meaning. Unfortunately, we use it as a convenient way to refer to the event that harmed the plaintiff, as in "Where were you going on the night of the accident," or "Did you have any problems with your back before the accident?" HOWEVER, from my experience of talking to thousands of jurors and focus group participants, I have learned this absolute truth: an "accident" is an event for which no one is legally at fault, and for which no compensation should be paid. Let me repeat that: when you, your staff, your client, or your witnesses, refer to the matter at hand as "the accident," you are telling the jury that what happened is one of those things for which no compensation is due.

Here's a real-world example: I was conducting a focus group in a case involving the grievous wrongful death of a child. I played a portion of the video deposition of the defendant that plaintiff's counsel thought was the most powerful evidence against the defendant. In that clip, however, the plaintiff's lawyer, the defendant's lawyer, and the defendant all repeatedly used the phrase "the accident" when talking about the event. When I asked the panel what they thought about the defendant's testimony, the first comment was "Why are we here?" When I asked the juror what she meant by that, she said "Everyone said this was an accident. Why are we here; there is nothing to decide." Game over.

The reality is that jurors see liability as shades of gray, as a sliding scale that always includes the conduct and motivation of both parties and of non-parties. But, you say, there is only black and white on the verdict form; the answer to "Was the Defendant negligent?" has to be "yes" or "no," right? That is true, but here is where the gray comes in: jurors evaluate and award *damages* based on the degree of the fault of the defendant, *not* on the severity of the injury or loss. Put another way, what type of damages they think are fair depends on how "bad" the conduct of the defendant was *and* how that degree of fault compares to the plaintiff's degree of fault.

Jeffrey D. Boyd, Esq.

"Jurors think an 'accident' is an event for which no one is legally at fault"

Services provided by Boyd Trial Consulting include:

- Interactive Focus Groups
- Mock Trials
- Evaluation of liability, damages, defenses, exhibits, demonstrative evidence, and witnesses/parties (live or videotaped)
- Developing Themes

Over and over, I have seen jurors think about fault as a continuum of moral blame. On that continuum, every time, "accident" is a lower degree of fault than "negligence." This is big trouble since, as they are constantly told in trial, "the plaintiff has to prove negligence to recover." To lawyers, a rear-end collision on a wet road is negligence per se, to jurors, it is often "just an accident." Game over.

Defensive attibution factors in, too. "There but for the Grace of God go I." Not only do jurors not want to live in a world where they can be doing everything right and get injured through no fault of their own, they don't want to live in a world where they could be held accountable for the kinds of things that "just happen." Accidents can happen to anyone; jurors don't want to estabilish a precedent for rewarding someone who sues over an accident.

Defendants win cases by: (1) blaming the plaintiff; (2) shifting the focus to a third party; and (3) distorting reality.

The "A" word is a classic distortion of reality. Things are rarely accidents. Your client was not hurt "by accident" when someone decides to drive a car too fast on a wet road, or when a manager cuts back a nursing staff so that a patient has to choose between risking a fall by trying to get to the bathroom by themselves or soiling their bed.

Jurors walk into the courtroom with a belief that many things that happen are accidents. Thinking that way is comfortable. Most people don't like to judge others. We prefer to live in a world where we can ignore that there are careless drivers, inept engineers, negligent doctors, and corporate managers who really do put profits ahead of safety. Add to that existing belief the phenomenon of "confirmation bias." This is the tendency of people to see the world through a filter. We absorb information that confirms what we already believe, and require serious, serious proof of anything that challenges what we already believe.

Since they believe that most bad things are "accidents," your use of that word fits right into their belief system. You have just created this dynamic: "I believe that no one is at fault for an accident, I think most things are accidents, you just told me this was an accident, that fits into what I believe, that reinforces what I believe, thank you." And now, because you have reinforced what they believe, the burden of proof required to push this "accident" into a compensable event is somewhere out there beyond the moon, regardless of what the jury instructions say. Game over.

Don't play the defendant's game. You are not fighting for your client because what happened was "just an accident." Your client is entitled to damages because of all of the negligent decisions that led to the final, terrible, preventable result. Removing the word "accident" from your entire vocabulary will better enable the jurors to focus on why the event occurred rather than be distracted by their belief that "accidents happen." "Accidents" don't happen.

I look forward to working with you on your next case!

Jeff

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[1] I concede that there are good reasons to keep "accident" in your internet search terms and on your website because prospective clients nearly always

- Witness Preparation
- Development of Voir Dire techniques
- Assistance with jury selection, in person, at trial
- Development of Supplemental Jury Questionnaires

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search for “car accidents” or “slip and fall accidents,” etc. But get it out of your substantive materials.